Concurring Statement of Chairman Joe Simons,

Regarding the Matters of Sandpiper/PiperGear and Patriot Puck

April 17, 2019

When companies make misleading or blatantly false "Made in U.S.A." claims, they undermine and skew consumer choice, and may create an unfair competitive advantage over a product or service that is marketed truthfully. Today I have voted to finalize the consent orders to resolve the Commission's allegations that Patriot Puck and Sandpiper/PiperGear made false "Made in U.S.A." claims for imported products in violation of the FTC Act.

These twenty year administrative consent orders prohibit Patriot Puck and Sandpiper/PiperGear from making deceptive "Made in U.S.A." claims. If they violate their orders in the future, the FTC could pursue civil penalties of up to $42,530 per violation.

The approach taken in these cases is consistent with that taken by the Commission for the last several decades under different administrations. Historically, the Commission has made the strategic choice to expend its limited resources to pursue administrative consent orders securing at least twenty years of conduct relief buttressed by the threat of significant penalties because they have been largely successful in keeping companies under order from making deceptive "Made in U.S.A." claims.

Last September, when I voted to submit the proposed consent agreements for public comment, I joined Commissioner Slaughter's concurring statement[1] in which we "highlight[ed] the possibility that the FTC can further maximize its enforcement reach . . . through strategic use of additional remedies." Specifically, we stated that in the U.S.-origin claim context, there may be instances in which monetary relief "may be warranted," such as "cases in which consumers paid a clear premium for a product marketed as 'Made in the U.S.A.'" Commissioner Slaughter now states that she misunderstood the Commission's legal authority, but I did not. And neither did staff when it negotiated these settlements.

Section 13(b) of the FTC Act allows the FTC to pursue equitable monetary relief, but not civil penalties. The joint concurring statement did not say, or otherwise suggest, that the Commission *must* demonstrate that consumers paid a price premium for the FTC to have the legal authority to seek equitable monetary relief pursuant to Section 13(b). My point was to consider whether our pre-existing bipartisan approach was the most effective or whether there were instances (without trying to define the entire universe of such cases) in which seeking monetary relief might be a better approach.

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[1] Concurring Statement of Comm'r Slaughter in re Nectar Sleep, Sandpiper/PiperGear, and Patriot Puck, joined by Chairman Simons, Sept. 12, 2018, https://www.ftc.gov/system/files/documents/public_statements/1407368/182_3038_nectar_sandpiper_patriot_rks_and_jjs_concurring_statement_0.pdf.

The FTC's enduring institutional strength has always been bolstered by our culture of self-reflection, our commitment to critical thinking, and our flexibility in response to changes in the marketplace. However, I continue to believe, as I and Commissioner Slaughter stated in September, that "a thoughtful review and forward-looking plan is a more effective and efficient use of Commission resources than re-opening and re-litigating the cases before us today." To that end, the agency intends to hold a workshop later this year on its "Made in U.S.A." enforcement program to consider whether the Commission is using its legal authorities as effectively as possible to fairly and efficiently pursue vigorous enforcement against companies and individuals that make deceptive U.S.-origin claims in the marketplace. This workshop—and not the interruption at the last second of an enforcement process based on sound legal and factual analysis[2]—is an appropriate vehicle to consider the prudence of the ideas my colleagues raise, such as whether the agency should undertake a rulemaking to codify a rule permitting the FTC to pursue civil penalties against companies and individuals that disseminate deceptive U.S.-origin claims, and whether to require defendants to admit liability in settlements. However, in considering new remedies and litigation strategies, it is important that the agency not do so in a vacuum. It will be crucial for the Commission to understand whether pursuing an alternative approach may drain resources from or otherwise undermine the FTC's other important enforcement programs without commensurate benefits to consumers.

[2] As Commissioner Slaughter acknowledges, the settlements were negotiated before the current set of Commissioners took office. Staff thoughtfully considered the comments filed during the thirty-day public comment period, but the comments did not provide any relevant new facts or legal analysis that were not previously considered. The Commission has issued letters to each commenter addressing their specific concerns and explaining that the Commission: (1) believes that the most efficient use of resources at this time is to finalize the proposed orders; and (2) is committed to considering additional remedies in appropriate future cases.